



Hilary Term

[2018] UKSC 2

On appeal from: [2015] EWCA Civ 1148

JUDGMENT

R (on the application of Gibson) (Appellant) v Secretary of State for Justice (Respondent)

before

Lord Mance, Deputy President

Lord Reed

Lord Carnwath

Lord Hughes

Lady Black

JUDGMENT GIVEN ON

24 January 2018

Heard on 5 December 2017

Appellant

Pete Weatherby QC

Matthew Stanbury

(Instructed by Swain & Co Solicitors)

Respondent

David Perry QC

Will Hays

(Instructed by The Government Legal Department)

LORD REED AND LORD HUGHES: (with whom Lord Mance, Lord Carnwath and Lady Black agree)

1.

This case concerns the enforcement of confiscation orders made by the Crown Court upon conviction. As well as various statutory mechanisms for enforcement via the appointment of receivers, successive confiscation statutes have adopted the scheme of making confiscation orders enforceable as if they were fines imposed by the Crown Court. That involves using the powers of the Magistrates' Court, which is the court which can, if payment is not made, issue a warrant committing the non-paying defendant to prison. When making the confiscation order (as when imposing a fine), the Crown Court is required by statute to fix a default term of imprisonment to be served if the defendant does not pay. In a simple case of non-payment, the magistrates will usually issue a warrant committing the

defendant to prison for the period which the Crown Court fixed as the default term, and that term has to be served consecutively to any sentence passed for the substantive offences which led to the making of the confiscation order. There are, however, two possible adjustments which may have to be considered. The first is interest. The second is part payment. The present appeal concerns how these two adjustments fall to be made when they coincide.

2.

Because the confiscation order made in this case, and the enforcement action taken in consequence, happened some time ago, this case falls to be decided upon legislation now repealed and replaced. It is not, however, of merely historical interest. Although the drafting of later legislation has not been identical, the issue raised by this appeal arises in much the same way under the current legislation, the Proceeds of Crime Act 2002.

3.

Put shortly, the issue is this. If between the making of the confiscation order by the Crown Court and the issue of a warrant by the magistrates committing the defendant to prison, part payment has been made, but also interest has accrued, what does the statutory scheme say about how credit is to be given for the part payment? Is the term of imprisonment ordered by the magistrates to be reduced, by reason of the part payment, by reference to the total net sum outstanding (including interest), or is reduction for part payment to be calculated by reference only to the principal sum payable under the confiscation order? It is trite, but important, to say at the outset that the question is not what scheme might be thought desirable, but rather what the convoluted statutes actually mean. It is also relevant to note that although the issue makes a difference of 11 days in the present case, in the context of a defendant sentenced originally to a term of 25 years for his substantive offences, it will apply to a large number of prisoners, and may fall for decision not only by courts, but also by prison governors who have to determine release dates.

The facts

4.

Mr Gibson was convicted of drug trafficking offences on 21 May 1999 and sentenced to 25 years' imprisonment. On 29 March 2000 at the confiscation hearing, he was ordered to pay a little over £5.4m; that meant that it had been determined by the judge that his benefit was not less than that sum and that he had assets from which that sum might be realised. He was given 12 months to pay, and the judge fixed the term of six years' imprisonment in default of payment. Interest therefore ran from the expiry of the 12 months to pay. He paid nothing until 4 May 2007, when £12,500 was paid, it would appear via a receiver appointed to realise his assets. A month later, he appeared before the magistrates for consideration of a warrant of commitment. The magistrates deducted seven days from the six year term in default, to take account of the recent part payment. As at that time, interest had lifted the net sum outstanding, allowing for the part payment, to £8.1m. Subsequently, later in 2007 and in 2011, two further realisations were achieved by his receiver, which produced payments of £12,500 and £65,370. The prison authorities, and through them the Secretary of State for Justice, calculated the reduction in the six year default term on the basis of the proportion which these payments bore to the £8.1m outstanding at the time of his committal. That produced reductions of three days and 21 days, totalling 24 days. If the arithmetic had been applied instead to an outstanding figure confined to the original £5.4m, something like 11 extra days reduction would have been made. The issue in the present appeal is whether he was entitled to those 11 extra days.

Interest on confiscation orders

5.

Uniquely amongst orders for payment of money made by criminal courts, confiscation orders carry interest. They have done so since the early 1990s: see section 15 of the Criminal Justice (International Co-operation) Act 1990 and section 9 of the Proceeds of Crime Act 1995, which introduced the rule respectively in relation to drugs offences and to other forms of crime. Interest has been set, by successive statutes, at the same rate as is prescribed from time to time for civil judgment debts under section 17 of the Judgments Act 1838.

6.

The interest provisions relevant to the present case were contained in section 10 of the Drug Trafficking Act 1994 (“the Drug Trafficking Act”), as in force at the relevant time:

10. Interest on sums unpaid under confiscation orders.

(1) If any sum required to be paid by a person under a confiscation order is not paid when it is required to be paid (whether forthwith on the making of the order or at a time specified under section 139(1) of the Powers of Criminal Courts (Sentencing) Act 2000) that person shall be liable to pay interest on that sum for the period for which it remains unpaid; and the amount of the interest shall for the purposes of enforcement be treated as part of the amount to be recovered from him under the confiscation order.

(2) The Crown Court may, on the application of the prosecutor, increase the term of imprisonment or detention fixed in respect of the confiscation order under subsection (2) of section 139 of the 2000 Act (as it has effect by virtue of section 9 of this Act) if the effect of subsection (1) above is to increase the maximum period applicable in relation to the order under subsection (4) of that section.

(3) The rate of interest under subsection (1) above shall be the same rate as that specified in section 17 of the Judgments Act 1838 (interest on civil judgment debts).

7.

For present purposes, the key provisions are:

(1) the concluding words of section 10(1), by which the interest is to be treated for the purposes of enforcement as part of the amount to be recovered under the confiscation order; and

(2) section 10(2), which enables a Crown Court judge to re-fix, and increase, the default term if the addition of accrued interest takes the sum outstanding into a higher bracket in the relevant schedule of permissible default terms.

8.

If the statutory scheme had stopped at this point, there would no doubt have been a powerful argument for saying that for all enforcement purposes interest is simply added to the original confiscation order. But this apparently fairly simple provision has to be considered in its place in the much more complex statutory scheme under which the magistrates’ powers of commitment to prison are made applicable to confiscation orders.

The application of the magistrates’ powers of commitment

9.

In common with other confiscation statutes, the Drug Trafficking Act referred enforcement by committal to prison to the Magistrates’ Court. By the time of the 2007 commitment proceedings in this case, section 9 provided:

9. Application of procedure for enforcing fines.

(1) Where the Crown Court orders the defendant to pay any amount under section 2 of this Act, sections 139(1) to (4) and 140(1) to (3) of the Powers of Criminal Courts (Sentencing) Act 2000 (powers of Crown Court in relation to fines and enforcement of Crown Court fines) shall have effect as if that amount were a fine imposed on him by the Crown Court.

The provisions there referred to in the (essentially consolidating) Powers of Criminal Courts (Sentencing) Act 2000 ("the 2000 Sentencing Act") were previously contained in sections 31 and 32 of the Powers of Criminal Courts Act 1973, to which section 9 in its original form referred. In the courts below all parties, and thus the courts, proceeded on the basis that the 1973 provisions were the relevant ones. It was common ground before this court that the 2000 Act provisions had become the relevant ones by the time of the commitment proceedings in this case. The difference does not matter, because although the wording is not identical, it is agreed that the effect of the two sets of provisions is the same.

10.

It follows that section 9 of the Drug Trafficking Act referred one on to sections 139 and 140 of the 2000 Sentencing Act, which are about fines. So far as material, they provided as follows:

"139. Powers and duties of Crown Court in relation to fines and forfeited recognizances.

(1) Subject to the provisions of this section, if the Crown Court imposes a fine on any person or forfeits his recognizance, the court may make an order -

(a) allowing time for the payment of the amount of the fine or the amount due under the recognizance;

(b) directing payment of that amount by instalments of such amounts and on such dates as may be specified in the order;

(c) [applicable only to recognizances]

(2) Subject to the provisions of this section, if the Crown Court imposes a fine on any person or forfeits his recognizance, the court shall make an order fixing a term of imprisonment or of detention under section 108 above (detention of persons aged 18 to 20 for default) which he is to undergo if any sum which he is liable to pay is not duly paid or recovered.

...

140. Enforcement of fines imposed and recognizances forfeited by Crown Court.

(1) Subject to subsection (5) below, a fine imposed or a recognizance forfeited by the Crown Court shall be treated for the purposes of collection, enforcement and remission of the fine or other sum as having been imposed or forfeited -

(a) by a magistrates' court specified in an order made by the Crown Court, or

(b) if no such order is made, by the magistrates' court by which the offender was committed to the Crown Court to be tried or dealt with or by which he was sent to the Crown Court for trial under section 51 or 51A of the Crime and Disorder Act 1998,

and, in the case of a fine, as having been so imposed on conviction by the magistrates' court in question.

(2) Subsection (3) below applies where a magistrates' court issues a warrant of commitment on a default in the payment of -

(a) a fine imposed by the Crown Court; or

(b) a sum due under a recognizance forfeited by the Crown Court.

(3) In such a case, the term of imprisonment or detention under section 108 above specified in the warrant of commitment as the term which the offender is liable to serve shall be -

(a) the term fixed by the Crown Court under section 139(2) above, or

(b) if that term has been reduced under section 79(2) of the Magistrates' Courts Act 1980 (part payment) or section 85(2) of that Act (remission), that term as so reduced,

notwithstanding that that term exceeds the period applicable to the case under section 149(1) of the Customs and Excise Management Act 1979 (maximum periods of imprisonment in default of payment of certain fines)."

Subsection (5), referred to in section 140(1), removes from the magistrates the power to remit part of a fine if the fine was imposed by the Crown Court. A similar stipulation against remission is additionally specifically applied to confiscation orders by section 9(4)(a) of the Drug Trafficking Act.

11.

It follows that the statutory scheme for the enforcement of confiscation orders proceeded then, as it does now, by a process of successive referrals. First, section 9 of the Drug Trafficking Act makes the confiscation order enforceable as if it were a fine imposed by the Crown Court. That refers one on to the 2000 Sentencing Act, by which a fine imposed by the Crown Court is by section 140(1) treated for enforcement purposes as if it had been imposed by the magistrates, and thus so is a confiscation order. But the magistrates' general powers in relation to their own fines are not in the 2000 Sentencing Act; they are found in the Magistrates' Courts Act 1980, to which one is thus further referred on. It is in the Magistrates' Courts Act 1980 (section 76) that the magistrates' power to commit to prison for failure to pay a fine is found, together with an alternative power to issue a warrant of distress (now re-named a warrant of control). And it is in the Magistrates' Courts Act 1980 that the only provision dealing with part payments is found. That is section 79 which at the time material to these magistrates' proceedings read as follows:

"79. Release from custody and reduction of detention on payment.

(1) Where imprisonment or other detention has been imposed on any person by the order of a magistrates' court in default of payment of any sum adjudged to be paid by the conviction or order of a magistrates' court or for want of sufficient distress to satisfy such a sum, then, on the payment of the sum, together with the costs and charges, if any, of the commitment and distress, the order shall cease to have effect; and if the person has been committed to custody he shall be released unless he is in custody for some other cause.

(2) Where, after a period of imprisonment or other detention has been imposed on any person in default of payment of any sum adjudged to be paid by the conviction or order of a magistrates' court or for want of sufficient distress to satisfy such a sum, payment is made in accordance with rules of court of part of the sum, the period of detention shall be reduced by such number of days as bears to the total number of days in that period less one day the same proportion as the amount so paid bears

to so much of the said sum, and the costs and charges of any distress levied to satisfy that sum, as was due at the time the period of detention was imposed.

(3) In calculating the reduction required under subsection (2) above any fraction of a day shall be left out of account.”

The problem of part payments

12.

Many of the difficulties which have beset the present case arise out of the fact that the enforcement of confiscation orders is thus achieved by applying to them statutory provisions which were not designed for them. In particular, the process of referrals just described has the effect that a confiscation order is treated for enforcement as if it was a fine imposed by the magistrates. But there is a very important difference in practice as between fines imposed by magistrates and fines (and confiscation orders) imposed by the Crown Court. In the case of the former, the magistrates do not fix a default term when imposing the fine. Instead, they approach the matter of imprisonment in default only after default has occurred. By then, of course, it will be known whether the default is total or partial, and the term imposed under the warrant of commitment can be, and ordinarily is, adjusted accordingly, thus in effect giving credit for part payments made before the commitment process is undertaken. Section 79(1) and (2) then deal with the situation if whole (subsection (1)) or part (subsection (2)) payment is made after the warrant of commitment is issued. But in the case of Crown Court fines and confiscation orders, section 139(2) of the 2000 Sentencing Act mandates the fixing of an anticipatory default term at the time the fine or order is imposed. It follows that something is required to cope with part payments made after the Crown Court order and before the Magistrates’ proceedings, as well as with payments made after the latter.

13.

This difference of practice led the courts below to analyse section 79(2) as assuming the standard magistrates’ practice and thus to conclude that the references in that subsection to a period of imprisonment having been “imposed ... in default of payment ...” were references to the act of the magistrates in issuing the warrant of commitment. That in turn gave rise to the difficulty that, on that basis, section 79(2) would say nothing about how to deal with part payments made in a Crown Court case between the Crown Court order and the later magistrates’ proceedings, and there was no other provision which filled the gap. The Court of Appeal understandably concluded that such part payments had to be taken into account, and to give effect to that conclusion it read two additional words into section 79(2) so that it read “Where, **before or** after a period of imprisonment ... has been imposed ...”: see [\[2017\] 1 WLR 1115](#), para 51.

14.

On the very helpful further argument which this court has had from counsel on both sides, it is now clear that section 79 does not, when it speaks of a period of imprisonment imposed in default of payment, necessarily refer only to the magistrates’ proceedings. That will of course be the position when the default term is imposed in the ordinary case of magistrates deciding whether or not to issue a warrant of commitment some time after default has occurred. But even then, the magistrates are entitled to issue the warrant and postpone its execution on terms, usually no doubt requiring prompt payment and perhaps by instalments. Section 77(2) of the Magistrates’ Courts Act 1980 specifically so provides. It follows that even in the case of an exclusively magistrates’ case, there may be a warrant of commitment without immediate imprisonment.

15.

Before this court, the parties were agreed that in the case of a Crown Court confiscation order or fine, the period of imprisonment in default of payment is “imposed” for the purposes of section 79 when the Crown Court discharges its statutory duty under section 139(2) of the 2000 Sentencing Act and fixes the (anticipatory) term in default. That is clearly the position where the period of imprisonment in default is imposed by the magistrates’ court, since section 79(1) specifically says that on full payment the default term ceases to have effect whether or not the person has been committed to prison, thus providing for the case permitted by section 77(2) where a warrant of commitment has been issued, but not yet executed. It also follows from section 150 of the Magistrates’ Courts Act, to which the courts below were not referred. That definition section provides:

“‘impose imprisonment’ means pass a sentence of imprisonment or fix a term of imprisonment for failure to pay any sum of money, or for want of sufficient distress to satisfy any sum of money, or for failure to do or abstain from doing anything required to be done or left undone.”

16.

This construction is also necessary to make sense of section 140(3) of the 2000 Sentencing Act, to which the courts below were not referred. This section is in more expansive form than its predecessor, section 32 of the Powers of Criminal Courts Act 1973. It makes clear by subsection 140(3)(b) that the default term fixed by the Crown Court may already have been reduced under section 79(2) of the Magistrates’ Court Act 1980 before the magistrates undertake the assessment of the length of any warrant of commitment.

17.

Lastly, this construction is clearly assumed by the Magistrates’ Courts Rules 1981 (SI 1981/552), to which the courts below were again not referred. These rules provide for the persons to whom part or full payment may be made for the purposes of section 79(2). By rule 55(1)(a) the designated officer of the court may receive such payment “unless there has been issued a warrant of ... commitment”, whereas if there is such a warrant, the payment must be made by rule 55(1)(c) or (d) either to a constable holding it (for execution) or the prison governor. That again demonstrates that payments which fall within section 79(2) can be made before a warrant of commitment is issued, although clearly they can only be made after the default term has been imposed. Thus the default term in the case of Crown Court orders must be the term that court imposed at the time of making its order.

Does section 79(2) include interest in its starting point?

18.

That leads one to the issue in the present case. If the court which imposes the default term is, for the purposes of section 79(2), the Crown Court in the case of a confiscation order, which is the correct starting point for the arithmetical giving of proportionate credit for part payment? Is it the sum stated in the order as originally made by the Crown Court, or is it that sum plus any interest which has accrued by the time the exercise is conducted by the magistrates? In the present case, is it £5.4m or is it £8.1m?

19.

For the Secretary of State, Mr Perry QC powerfully submits that it must be the original sum plus interest. The plain purpose of the various statutory provisions for interest, including section 10 of the Drug Trafficking Act, is, he submits, that interest is treated for any enforcement purpose as added to the confiscation order and is expressly made part of “the amount to be recovered from [the defendant] under the confiscation order”. So, it is said, the references in section 79(2) to the term set in default of payment of “any sum adjudged to be paid” must, by what he refers to as a necessary statutory

fiction, be references to the sum fixed by the original confiscation order plus interest. That is to do no more, he argues, than is already provided for in section 79(2) for the costs and charges of any distress which has been levied, which are expressly added to the principal sum outstanding. Those also, he submits, will in the case of a Crown Court order, necessarily have been incurred after the default term was fixed by that Court. He points to the plain intention, gathered from section 10(1), that interest is to be paid, and to the fact that in the case of a criminal who is in default of payment of the principal sum, civil means of enforcement of interest are unlikely to be effective. He rightly reminds us that a confiscation order is premised on the proposition that the defendant has the means to pay, so that any default is his election. If circumstances change in a way which reduces his ability to pay, the various confiscation statutes provide a procedure for application for a certificate of inadequacy and consequent downward reduction in the amount of the confiscation order.

20.

Those arguments may well reflect, in a purposive manner, the kind of regime for which the successive statutory referrals might have provided. The difficulty with them lies in the operative words of section 79(2), which are the only ones which provide for the treatment of part payments. They say expressly that the days to be deducted are to be the number which bear the same proportion to the total default term imposed (by the Crown Court) as the part payments bear “to so much of the said sum ... as was due at the time the period of detention was imposed”. If the Secretary of State’s argument is to be accepted, the words “at the time the period of detention was imposed” have to be done no little violence. At the time the Crown Court imposed the default term, there was as yet no interest accrued at all.

21.

We have concluded that this straining of the wording of section 79(2) cannot be justified in circumstances where it would adversely impact on the period of imprisonment to which a person would be subject. Penal legislation is construed strictly, particularly where the penalty involves deprivation of liberty. The words of section 79(2) do not provide clearly for a period of imprisonment calculated on the basis for which the Secretary of State contends; on the contrary, they suggest the natural construction that the starting point for the arithmetical calculation of reduction in days of imprisonment is the sum outstanding at the time of the Crown Court order.

22.

Nor is the Secretary of State’s construction warranted by the example of the reference in section 79(2) to the costs and charges of distress, where such have been incurred. Since section 79(2) was plainly not drafted with confiscation, or for that matter Crown Court fines, in mind, the reference is adequately explained by the orthodox case of the magistrates first issuing a warrant for distress and only subsequently fixing the default term for non-payment; in such a case the reference to the sum outstanding at the time the period of detention was imposed makes perfectly good sense. In any event, the addition of such costs and charges is expressly provided; that does not mean that an equivalent provision can be read in as a consequence of a provision in a different statute, namely section 10(1) of the Drug Trafficking Act.

23.

A scheme under which the period of imprisonment served in default of payment in full of the amount specified in the confiscation order is based on the entire amount outstanding, including interest, may or may not be what the framers of the confiscation legislation might have wished for or intended if the point had been considered. However, because the means adopted took the form of statutory reference (and re-reference) to provisions which were drafted for a different purpose and without confiscation in

mind, they have not achieved that effect. If it is desired that they should do so, express legislation will be needed.

24.

It is also of some relevance that the practical consequences of the Secretary of State's proposed construction would, without specific machinery, be difficult to work out. Interest accrues daily, so the net amount outstanding would also vary daily. That difficulty may be met by a calculation geared to the particular day (or days) on which any part payment is made. But additionally, this construction would have the effect of progressively reducing the incentive to make part payment, as interest rises, because the days credited for such part payment would progressively reduce. Nor would such a scheme provide any consequences at all for the not uncommon defendant who simply makes no payment whatever.

Conclusion

25.

For these reasons we would allow the appeal.